LOI HIENG CHIONG

v.

KON TEK SHIN

FEDERAL COURT, KUCHING
LEE HUN HOE CJ (BORNEO)
SYED OTHMAN FJ
ABDUL HAMID OMAR FJ
[CIVIL APPEAL NO. 129 OF 1981]
28 APRIL 1982

LAND LAW: *Transfer of land by way of exchange - Whether void for fraud.*

The appeal was against the decision of the High Court at Kuching declaring that the exchange of lands between the parties was void by reason of fraud, and dismissing the appellant's counter claim. The respondent, an illiterate old farmer and the appellant, a land broker, had agreed that the respondent would transfer his Kuching land to the appellant who would transfer his Sibu land to the respondent. The respondent had then signed the transfer, in which the consideration of RM55,000 for each land was inserted. But the respondent had later brought an action to have the transfers declared void for fraud. He alleged that when he had wanted to sell his Kuching land he had been introduced by Thian, a land broker, to another land broker, Bong Thong, who brought in the appellant; that the agreed price for his Kuching land was RM115,000 and that the consideration of RM55,000 noted in the transfers was inserted at the suggestion of the appellant to save stamp duty. The appellant, on the other hand, claimed that when he had been introduced to the respondent by Bong Thong he, the respondent, had agreed to sell his land for RM55,000.00 in exchange for the Sibu land, which too was worth RM55,000. The appellant counterclaimed for damages, alleging that as a result of the false allegation by the respondent lodging a caveat against the Kuching land, the appellant had suffered damages. The trial Judge found for the respondent. The appellant appealed.

Held:

[1] Though the chartered surveyor giving evidence on the value of the land had not visited it, as it was not accessible by road, his evidence as to the true value of that land was admissible. The appellant's claim that the value was RM55,000 must be rejected as there was no other evidence to support it.

[2] The trial Judge was entitled to accept the value of the Kuching land as RM115,000. Considering the number of cases passing through the Courts nowadays, the Courts are entitled to take cognisance of land values in a given area in their country.

[3] Thian's statement, that he had been approached by Bong Thong to join in a scheme to cheat the respondent, although an expression of opinion, tended to shown intention or motive. Further, it established circumstantiality by the subsequent conduct of the appellant and Bong Thong leading to the exchange of the land titles, which conduct was relevant to ascertain the intention behind the exchange. In any event, there was nothing to show that the trial Court was at all affected by the statement.

[4] The discrepancies in the respondent's case were not material as they did not detract from the main allegation by the respondent of fraud by the appellant, which allegation the Court would have to determine generally.

[5] In the circumstances of the case, the staff of the legal firm responsible for the execution of the transfers, must have known the exchange as executed was not a fair one.

[6] Considering the case as a whole, it was a clear that the exchange of lands was not fair, just or reasonable and that the appellant had perpetrated fraud in the exchange of the land titles. Where the relative position of the parties is such as raises the presumption of an unconscientious use of power arising out of the circumstances and conditions, the transaction cannot stand unless the person claiming the benefit of it is able to repeal the presumption by contrary evidence proving to have been in point of fact fair, just and reasonable. The test is on the act or conduct of the defrauder. Fraud must be actual fraud, and is established if the designed object of a transfer is to cheat a man to cause him to lose a known existing right. [*Avlesford v. Morris* [1873] 8 Ch App 484; *Fry v. Lane* 40 Ch D 312; *Derry v. Peek* [1889] 14 AC 337, 374; *Assets Company, Limited v. Mere Roihi & Ors.* [1905] AC 176; *Waimiha Sawmilling Company, Limited v. Waione Timber Company, Limited* [1926] AC 101].

[Main appeal and appeal on counterclaim dismissed.]

Cases referred to:
Avlesford v. Morris [1873] 8 Ch App 484
Derry v. Peek [1889] 14 AC 337
Assets Company, Limited v. Mere Roihi & Ors. [1905] AC 176
Waimiha Sawmilling Company, Limited v. Waione Timber Company, Limited [1926] AC 101

Legislation referred to:
Land Transfer Act 1885 (New Zealand), s. 55
Land Code (Cap 81) (Sarawak), s. 134(1)

For the appellant - T.O. Thomas; M/s. Thomas & Co.
For the respondent - Lee Chuan Eng; M/s. Ee & Lim

JUDGMENT

Syed Othman FJ:

This appeal is against the decision of the High Court at Kuching declaring that the exchange of lands on 7 February 1977 between the parties was void by reason of fraud and dismissing the appellant's counterclaim. The lands were, one held by the respondent was at 13 m.s. Simanggang road, Kuching (Kuching land) measuring 8.56 acres and which before the exchange he had wanted to sell for RM115,000 or RM12,500 per acre, and the other which the appellant claimed to have purchased for RM55,000, was at Bukit Igu, Sibu (Sibu land) measuring about 9.40 acres and valued by a chartered surveyor at RM1,880 or RM200 per acre. The transfer forms show that the consideration of each transfer was RM55,000.

The respondent brought his action in May 1977. The appellant in his defence contended that the respondent had told him that he wanted to settle in Sibu and would like to buy land there; the appellant too at the time intended to dispose of his Sibu land; it was the respondent who had proposed the exchange of lands as contained in a letter in Chinese (D1) by the respondent to the appellant dated 1 February 1977.

The appellant counterclaiming against the respondent for damages and costs alleged that as a result of the false allegation by the respondent lodging a caveat prohibiting any dealing in the Kuching land, the appellant had suffered damages and incurred expenses in engaging Counsel.

The respondent's story was as follows: The respondent, an old farmer, towards the end of 1976, told a land broker Thian Foong Chin, PW4 (Thian), that he wanted to sell his Kuching land. Thian introduced him to another land broker Bong Thong alias Bong Khi Shi (Bong) who brought in the appellant. The appellant introduced himself to the respondent as a Sibu broker. The respondent told the appellant that the selling price of Kuching land was RM115,000. The appellant told him he wanted an exchange of Kuching land with his Sibu land which was worth RM175,000. The appellant told him that the Sibu land belonged to a businessman in Sibu, who had asked the appellant to look for land in Kuching. The appellant brought to the respondent the businessman, who was introduced to the respondent as Choo and who brought some money with him. The appellant carried a briefcase. Opening it, he showed the respondent that it contained a lot of money. But when the respondent wanted to touch the money, the appellant closed the briefcase. The respondent asked Choo to make a deposit between RM30,000 and RM40,000 but Choo said he would do so after a sale and purchase agreement had been signed. The next day, Choo, Bong and the appellant came to the respondent's house. They took him to a legal firm. Apparently nothing happened that day and the evidence shows that they met a number of times before the transfer took place. On the day in question they met for lunch and the respondent was taken to the legal firm. The appellant spoke to the office assistant, defence witness No. 2. The respondent did not give any instructions. He could not understand when the office assistant explained the contents of the transfers forms to him. As far as he could make out, the respondent would transfer the Kuching land to the appellant who would transfer the Sibu land to him. The respondent did not do anything because the appellant had told him that the procedure would save stamp duty. Then they saw an advocate, (defence witness No. 3), who in Sarawak also functions as a Solicitor. The respondent could not understand the advocate's explanation because he spoke in Hakka; the respondent is Foochow. At first the respondent refused to sign the transfers. The appellant hit the respondent's hand and leg. After the signing of the transfers, (P2 and P3), the respondent asked for payment. The appellant replied there was no money to be paid because there had been an exchange of lands. He met the appellant two or three times after the signing of the transfers, and asked for payment. Eventually he went to the legal firm and enquired about payment of the purchase price but the advocate informed him that the transaction had been an exchange of lands. The respondent quarrelled with the office assistant who told him the transaction had nothing to do with him. The respondent returned home and told his wife (now deceased) that he could not get any money. After consulting an uncle he reported the matter to the police.

In cross-examination the respondent denied having written the letter, D1, agreeing to the exchange. He also told the Court he signed the transfer forms horizontally; the signature in D1 was vertical and a forgery.

The defence (appellant's) version is briefly as follows: The appellant bought the Sibu land from Loui Teck Chii for RM55,000 in September 1976 payable by three instalments, He could not decide whether to put the land in the name of his wife or younger brother. In January 1977 he came to Kuching and met two persons discussing land transactions. One was Bong. On enquiring if there was any land in Kuching for sale, Bong told him about the respondent's land. He told Bong he had the Sibu land and wanted to exchange it for a piece of land in Kuching. The same afternoon Bong brought him to the respondent's house at 13th mile Simanggang road. The appellant was not impressed with the respondent's land as it was under floodwater. The respondent told him he wanted to sell the Kuching land for RM50,000 - RM60,000 and he wanted to move to Sibu, as he was away from his daughter. Bong told the respondent that the appellant wanted to sell the Sibu land. The appellant told him that

the Sibu land was planted with rubber 10 years old and the soil was black. The respondent was happy on hearing this, saying that his land was planted with old rubber tress which were useless and that he did not make any money from pepper vines on the land. The respondent was very happy when Bong suggested the transfer. The appellant gave him a photocopy of the title and told him that although the title was in the name of Loui Teck Chii the appellant had bought the land. About a month later he met the respondent by chance near the dockyard. The respondent took him to a coffee shop and told him that he had asked a friend to write a letter for him to be sent to the appellant but did not know his address. The respondent showed him D1 but the appellant told him that he could not read Chinese. The respondent explained the contents. The appellant put D1 in his pocket. The respondent told the appellant that he should bear the stamp and legal fees and should be responsible for Loui Teck Chii transferring the Sibu land to him. The appellant met the respondent again on 4 February 1977. He handed over to the respondent the land title. The respondent took him to the legal firm. There they met the office assistant of the legal firm who asked them to think the matter over. (According to the office assistant, when he saw the Sibu land title he asked the appellant whether he had a power of attorney; when the appellant said he did not have it, he told both of them the exchange could not be effected). On 7 February 1977 both the appellant and the respondent again saw the office assistant at the legal firm with the two transfer forms. The office assistant explained the contents. The respondent suggested that the consideration of RM55,000 to be inserted in the transfers. The respondent was then taken to the advocate, who explained the contents of the documents and he signed them. Some eight or nine days later a relative of the respondent came to see the advocate and told him that the respondent had been cheated in the transaction. The appellant denied that he had offered to sell the Sibu land on behalf of the respondent for RM175,000 and that he had said the land was situated between two sawmills.

The memorandum of appeal contains numerous grounds mainly on findings of facts.

The law which affects registrations of titles made by fraud is contained in s. 134(1) of the Sarawak Land Code which reads:

> any issue document of title or entry or alteration in the Register procured or made by fraud shall be void as against the person defrauded, or who may be defrauded, thereby and no person who is a party or privy to the fraud, or who claims solely as a volunteer under such person, shall take any benefit therefrom.

The learned Judge accepted the evidence of the chartered surveyor as to the true value of the Sibu land. He also made findings to the following effect:

During the first meeting the appellant represented to the respondent that he was a broker acting for a Sibu businessman to look for land in Kuching; the appellant tempted the respondent by showing him a briefcase full of money for the respondent to see; by the act of the appellant not allowing the respondent to examine the money the learned Judge inferred that only top part contained currency notes and the lower part stacked with ordinary paper; the respondent was an illiterate old farmer with little knowledge of the world; the appellant agreed to purchase the Kuching land for RM115,000. After that he visited the respondent seven to eight times and he dishonestly told the respondent that -

(a) he owned the Sibu land worth RM175,000;

(b) the land was situated between two sawmills; and

(c) someone had offered to buy it for RM175,000.

The learned Judge also found that there was a conspiracy between the appellant and Bong to cheat the respondent; prior to this Bong had approached Thian to join the scheme but Thian had refused and then warned the respondent. The learned Judge believed the evidence of the office assistant of the legal firm and the advocate as to what had transpired before and after the transfer took place; the consideration of RM55,000 was put on the transfer forms at the request of the appellant in order to pay less stamp duty; considering that the appellant was a land broker and the respondent a farmer, the learned Judge was of the view that the appellant would know more about stamp duty; and did not accept that the appellant had purchased the Sibu land for RM55,000.

It is argued that there was no admissible evidence to show that the Sibu land was of less value than the Kuching land. We see no reason as to why the trial Court should not accept the evidence of the chartered surveyor, who after considering transactions in the surrounding areas, valued the Sibu land at RM200 per acre. He could not visit the place because there was no access road to the land, which does not appear to have been disputed. To put up such land at the value of about RM55,000 per acre is a gross over-valuation. The learned Judge accepted the evidence of the respondent and his uncle Peter Kon Siong Chin (PW3) that the Kuching land was worth RM115,000. We do not think that this was the sole factor in the learned Judge's mind. Considering the number of land cases passing through the Courts nowadays, the Courts are entitled to take cognisance of land values in a given area in this country. One does not have to be a valuer to know that in Kuching and the surrounding areas, land has shot up in value by reason of the tremendous expansion of the town. In the present case, the Kuching land is at Simanggang road and the Sibu land has no access road and it lies across the river from Sibu town. We have been referred to the Originating Summons (OS) put in as exhibit by the respondent. The OS was an application by the appellant to remove the respondent's caveat on the Kuching land, and the caveat is the subject matter of the appellant's counterclaim. The OS is also relevant to determine the value of the Sibu land in the face of other evidence. In the affidavit of Loui Teck Chii, from whom the appellant was said to have purchased the Sibu land, he merely said that the appellant had paid the last instalment for the purchase but he did not indicate the amount. The learned Judge seemed to have accepted the evidence of the appellant that he had destroyed the receipts for the first and second instalments before the Chinese New Year. For ourselves, we would not be prepared to accept that a Chinese and a land broker would before a Chinese New Year destroy evidence that he has only partly paid towards the purchase of a piece of land. In any case, the appellant did not tell the Court the whereabouts of the receipt for the third instalment. Since the true value of the Sibu land was not disclosed, the learned Judge rightly rejected the evidence of the appellant that he had purchased the Sibu land for RM55,000, the same figure quoted by Bong in his affidavit. The amount happened to be the same as the selling price of the Kuching land, if the appellant's evidence is to be accepted the respondent wanted to sell the Kuching land at this sum. From all this it is clear that the appellant had not been honest in quoting the true value of Sibu land.

It is also argued that the trial Court erred in admitting the evidence prejudicial to the appellant when in the grounds of judgment the learned Judge said

> Thian (PW4) informed the Court that he was approached by Bong Thong who suggested to Thian to join him in a scheme to cheat the plaintiff (respondent) regarding the Kuching land but he turned it down.

The evidence of both the respondent and the appellant showed that the appellant and Bong had been visiting the respondent seven to eight times resulting in the exchange of the lands. Bong in his affidavit relating to the OS stated among other things that the appellant had

told him that he had a land in Sibu which he wanted to sell for RM55,000 or exchange it for some other suitable land. The appellant did not produce any real evidence to show that the Sibu land was worth that much. Then we have D1 (which the appellant apparently did not destroy before the Chinese New Year) whereby the appellant attempted to show that the respondent had agreed in writing to the exchange of the lands. The respondent denied he had executed it and charged that it was a forgery. The appellant did not pursue further with the evidence. Then, the appellant in his defence said that the proposal for the exchange came from the respondent. But in evidence he said he had told Bong that he wanted to exchange the Sibu land for a land in Kuching; he also said he came to know of the Kuching land from Bong. The statement as it stands merely implicated Bong. Although it was an expression of opinion it tended to show intention or motive. On the appellant's own evidence Bong appeared to have played a great part in the negotiation and the indications are that he was working with the appellant, as in the later part of the appellant's evidence, he said that Bong suggested the exchange. From this it can be surmised that the appellant was trying to put forth that if there was anything untoward in the transaction, Bong was to blame. The appellant in the circumstances of the case should have called Bong to give evidence. Further the statement established circumstantiality by the subsequent conduct of the appellant and Bong leading to the exchange of the land titles. This by itself is relevant to ascertain the intention to obtain the exchange. In any event, the trial Court in coming to its conclusion was mainly concerned with the material evidence. There is nothing to show that the Court was at all affected by the statement.

Another ground of appeal is that the learned Judge failed to take into consideration contradictions in the respondent's case, viz: in March 1977 the respondent said that the sale was void for want of consideration; and in May 1977 he said that the "consideration for RM55,000 had not been paid" and, then in February 1981, he contended that "Because I did not receive the purchase money from the defendant (appellant) I say that he had cheated me". We do not consider these discrepancies are material, as they do not detract the main allegation of fraud by the respondent against the appellant. It is a matter for the Court to determine whether or not generally there was fraud, and in particular there was further payment to be made by the appellant after the transaction.

The learned Judge accepted the evidence of the office assistant of the legal firm and the advocate as to what had transpired before them before the transfer documents were executed. It is contended that on their evidence there was nothing to show fraud. But if their evidence is examined neither of them said that he knew the true value of the Sibu land as against the Kuching land or warned the respondent of the great disparity in value of the lands. According to the appellant it was the respondent who suggested that the value of each land should be put at RM55,000. On the evidence before the trial Court, this sounds to us to be farfetched. The respondent being a farmer would have to be guided as to how to fill in the transfer forms. Neither the office assistant nor the advocate gave evidence who was actually responsible for the consideration being put in the transfers. We agree with the learned Judge that the consideration was put at the instance of the appellant. Being a land broker he had all the experience in dealing with a legal firm, the Land Office and the Stamp Office. Further, there is evidence to show that the appellant knew that the respondent wanted RM115,000 for his land. At p. 70 of the record the appellant said in evidence "I did not agree to buy KOT/13896 from the plaintiff (respondent) for RM115,000". He then said that the respondent had told him the selling price of the Kuching land was between RM50,000 and RM60,000 and that he (appellant) had bought the Sibu land for RM55,000. This very evidence supports that the appellant was responsible for the consideration of one piece of land matching the

other and suggests collusion by the others who were with him. The appellant also said that he had bought the Sibu land as an investment. The exchange of the two lands occurred almost immediately after he was said to have bought the Sibu land and despite the fact that he was not impressed with the Kuching land, as according to him it was subjected to floods. It seems that the investment he had in mind was to work on the respondent so that there would be an exchange. The learned Judge found that he must have represented to the respondent that the Sibu land was worth RM175,000. Apart from that, there is the evidence of the appellant (who is 40) worming his way into the confidence of the respondent. On his second visit to the respondent, he offered himself for adoption by the respondent and the respondent agreed. This was clearly a device to lull the respondent's suspicion. So much so that although the respondent said he did not believe the appellant as to the value of the Sibu land and its other attributes, he was nonetheless led to believe that the Sibu land was about the same value as the Kuching land, when in fact it was not. In any case, from the events subsequent to the transfers he was also led to believe there would be further payment when in fact there was not. In our view this was sufficient inducement to get the respondent to agree to the exchange of the lands.

Dealing further with the evidence of the office assistant of the legal firm and the advocate, the impression they gave is that they only asked the respondent to consider the matter before agreeing to the exchange. But there is nothing to show whether they enquired from the parties as to the true value of each land. When they asked the respondent to consider the matter they must have known that something was amiss and that the exchange was not a fair one. Any person in their standing should be familiar with or have a rough idea of land values in their immediate area having regard to land transactions which pass through their firm. They also should have known that the Sibu land at Bukit Igu, which is across the river from the Sibu town, did not match the value of the Kuching land. In the light of the chartered surveyor's evidence the disparity is too great as not to be within the knowledge of persons who run legal firms in Sarawak. Even if their evidence could be accepted on its face value, they must have known that unless there was a further substantial payment by the appellant, the exchange was not a fair one. Before the transfer documents were executed neither of them, apparently, felt it was his duty to inform the respondent of the true position. The fact that the respondent went to the advocate's office some days later and asked for money showed that there must have been some promise by the appellant that further payment would be made and those running the office must have known about it.

As regards the law, it has been said that the Courts have so for not ventured to lay down as a general proposition what amounts to fraud. It can only be determined from acts and circumstances of a particular case. It usually takes the form of a statement of what is false or a suppression of what is true. Where the relative position of the parties is such as raises the presumption of an unconscientious use of power arising out of the circumstances and conditions, the transaction cannot stand unless the person claiming benefit of it is able to repeal the presumption by contrary evidence proving to have been in point of fact, fair, just and reasonable per Lord Selborne, LC in *Avlesford v. Morris* [1873] 8 Ch App 484; See also *Fry v. Lane* 40 Ch D 312.

In *Derry v. Peek* [1889] 14 AC 337, 374 it was held that to establish fraud it is necessary to prove the absence of a honest belief in the truth of that which has been stated; in the words of Lord Herschell:

> Fraud is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth; or (3) recklessly, careless whether it be true or false.

In the case here the appellant got himself into the position of being adopted by the respondent and deliberately suppressed the true value of the Sibu land. He must have known that if he had told the truth, the respondent or any ordinary person would not have accepted the exchage. He pretended that he was not impressed with the Kuching land as it was subjected to floods. He was deliberately false when he said that there had been an offer to purchase the Sibu land for RM175,000 and that the land was situated between two sawmills, and also when he gave the value of the Sibu land at RM55,000 in the transfer form. There is nothing in law which says, that, as has been put forth, if the plaintiff did not believe the representations of the defendant he cannot complain of fraud. The test as indicated in *Derry v. Peek* (*supra*) is on the act or conduct of the defrauder and not on that of the defrauded.

In *Assets Company Limited v. Mere Roihi & Ors.* [1905] AC 176 s. 55 of the New Zealand Land Transfer Act, 1885 provides in effect that the register is conclusive evidence of the title of the registered proprietor, except in cases of fraud, prior certificates of title ... etc. Lord Lindley at p. 210 said:

> Fraud in these actions (i.e., actions seeking to affect a registered title) means actual fraud, dishonesty of some sort, not what is called constructive or equitable fraud - an unfortunate expression and one very apt to mislead, but often used, for want of a better term, to denote transactions having consequences in equity similar to those which flow from fraud.

In *Waimiha Sawmilling Company, Limited v. Waione Timber Company, Limited* [1926] AC 101 Lord Buckmaster, after citing the above passage, said at p. 106-7:

> If the designed object of a transfer be to cheat a man of a known existing right, that is fraudulent, and so also fraud may be established by a deliberate and dishonest trick causing an interest not to be registered and thus fraudulently keeping the register clear.

The words appearing in the latter case and which read "causing an interest not to be registered and thus fraudulently keeping the register clear" merely illustrate the effect of fraud. From these two authorities, fraud must be actual. There must be dishonesty of some sort. Fraud may be established if the designed object of a transfer is to cheat a man of a known existing right; or where by a deliberate and dishonest act a person loses an existing right.

Considering the case as a whole in the light of the above authorities, the evidence, even the appellant's own, clearly shows that the appellant was not honest as to the true value of the Sibu land when he persuaded the respondent to exchange the lands. Further, even if his evidence purporting to show that the value of the Kuching land was RM55,000 and not RM115,000 as stated by the respondent can be accepted, the exchange was still not fair, just and reasonable, having regard to the accepted value of the Sibu land. [See *Avlesford v. Morris (supra)*].

There is no need for us to deal with other grounds of appeal as on the evidence we agree with the learned Judge that the appellant perpetrated fraud in the exchange of the land titles. The declaration must therefore stand.

The main appeal and appeal on counterclaim are dismissed with costs. Deposit to respondent to the account of taxed costs.

Also found at [1983] 2 CLJ 70